

No. 11873

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HAZEL EDNA LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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JURISDICTION

In the present cause, appellant was regularly indicted, represented by counsel, tried and convicted on Counts I, V, and VIII. Sentence of two years was imposed on each count, sentences to be concurrent.

Jurisdiction is based on Title 26 U.S.C., Section 3793.

STATEMENT OF THE CASE

The indictment in the present cause reads as follows:

COUNT I.

"On or about December 5, 1946, at Longview, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. J. A. Nelson a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to-wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 U.S.C., Section 3793."

Count V is identical except as to the date, place and name of the physician.

Count VIII is identical except as to the date, place and name of the physician.

The jury returned a verdict of guilty as to these three counts. No motion for judgment of acquittal was made by appellant.

The sole question at issue before this Court is the determination of whether the aforesaid counts of the indictment charge the commission of a crime.

Title 26 U.S.C., Sec. 3793 reads as follows:

Every person who —

A. Simulates or falsely or fraudulently executes

or signs any bond, permit, entry or other document required by the provisions of the Internal Revenue laws, or by any regulation made in pursuance thereof, or

B. Procures the same to be falsely or fraudulently executed, or

C. Advises, aids in, or connives at such execution thereof — shall be imprisoned for a term of not less than one year nor more than five years.

It will be observed that the indictment is brought under subdivision "B" of the statute. It follows the words of the Statute, and is a plain, concise and definite written statement of the essential facts constituting the offense charged. It states every material fact necessary to inform the defendant with reasonable certainty of the nature and cause of accusation against her, and to enable her by plea of former jeopardy to be protected against another prosecution for the same offense. That is sufficient.

Rules of Criminal Procedure — 7(c);
Wilson v. United States, 158 Fed. (2d) 659;
United States v. Starks, 6 F.R.D. 43;
United States v. Grunenwald, 66 Fed. Supp. 223.

There was no request for a bill of particulars, no motion to quash, or demurrer. There was no motion for a judgment of acquittal.

If an indictment contains averments which clearly express what was meant to be charged even though

such averments were not technically in language of the Statute, such technical defects are cured by the conviction and judgment, in view of defendant's failure to ask for a bill of particulars or to attack the indictment by motion to quash or demurrer.

Pifer v. United States, 158 Fed. (2d) 867;
Lucas v. United States, 158 Fed. (2d) 865.

The Commissioner of Narcotics, with the approval of the Secretary of the Treasury was authorized by the Statute to issue and promulgate regulations.

Title 26 U.S.C., 2559;
 Title 26 U.S.C., 2606.

In accordance with the authority granted by the foregoing sections of the Code, the Commissioner of Narcotics and the Commissioner of Internal Revenue, with approval by the Secretary of the Treasury, prepared, issued and promulgated the following Regulation:

“All prescriptions for drugs and preparations not specifically exempt under Section 6 of the Act shall be dated as of, and signed on the day when issued and shall bear the full name and address of the patient and the name, address and registry number of the practitioner.”

Regulations No. 5, Article 168, adopted June 1, 1938, (26 C.F.R. 151, 168).

If these Regulations were in furtherance of the purposes of the Act, they have the effect of law.

Loose-Wiles Biscuit Co. v. Rasquin, 20 Fed. Supp. 805;

Yakus v. United States, 321 U.S. 414.

That the Regulations were in furtherance of the administration of the law cannot be questioned.

The Act — 2554(c) (1), provides that in the dispensing of drugs by a physician, the physician shall keep a record of all such drugs dispensed or distributed showing the amount dispensed or distributed, the date and address of the patient to whom such drugs are dispensed * * * and such record shall be kept for a period of two years.

The Act — 2554(c) (2) provides for prescriptions: To the sale, dispensing or distribution of any of the drugs mentioned in 2550(a) by a dealer to a consumer in pursuance of a written prescription; provided however that such prescription shall be dated as of the day on which signed and shall be signed by the physician who shall have issued the same, and provided further that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, etc.

The Act—2554 provides that the possession of

drugs shall be lawful when they "have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician * * * or other practitioner registered under Sec. 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of the prescription, name and *address* of the patient, and name, address and registry number of the person writing the prescription.

AUTHORITIES

The Federal Narcotic Acts have been the source of litigation in all phases ever since the enactment of the Harrison Narcotic Act. The constitutionality was upheld by the Supreme Court at an early date after its passage.

United States v. Doremus, 249 U.S. 86;

United States v. Wong Sing, 260 U.S. 18.

The presumptions under the Act were upheld.

Casey v. United States, 276 U.S. 413;

Nigro v. United States, 276 U.S. 332.

The Narcotic Drugs Import and Export Act was likewise upheld.

Brolan v. United States, 236 U.S. 216.

That a prescription is a document under the Act has been decided by this Circuit in two recent decisions.

In the case of *Johnson v. Warden, U. S. Penitentiary*, 134 Fed. (2d) 166, this Court held—

A forged physician's prescription for narcotics would fall within the meaning of the phrase "other writing" as used in the Statute making uttering of a forged bond, bid, etc., or other writing for the purpose of defrauding the United States.

"By 26 U.S.C.A. Internal Revenue Code, Sec. 2554, it is made unlawful for any person to sell or give away any narcotic drugs except in named circumstances, one of which is upon prescription issued by a registered physician, dentist or veterinary surgeon. It is obvious that the utterance of a forged prescription tends directly to frustrate the laws of the United States relating to the dispensing of narcotics."

And in *Hart v. Squier*, 159 Fed. (2d) 639, in which case the indictment charged the defendant with uttering and publishing as true a certain false writing, being a prescription for narcotic drugs issued by Wm. C. Riddell, M.D., a registered physician, and purportedly issued to Melvin G. Baker, 902 - 6th Ave., Seattle, Washington, which was the false and fictitious name and address of the said defendant, this Court ruled—

"In *Johnson v. Warden*, we held that a prescription for obtaining narcotic drugs was a 'writing' within the terms of the Statute. We further held that it was unnecessary to show any pecuniary loss to the Government as a result of the fraud, and that it was enough that the unlawful activity frustrated the administration of a statute (in this case 26 U.S.C.A. 2554). The narrow inquiry, therefore, is: Is the prescription 'false' or 'forged' within the meaning of the statute?

"To state the question is to answer it, for under the allegations of the indictment the name on the prescription is not appellant's true name, but is assumed, fictitious — false."

In the instant case the allegation is that the defendant "procured to be falsely * * * executed" a prescription, and that it was falsely executed because "it contained a false and fictitious address". This language paraphrases the holding of the *Hart* case.

The sole question being the sufficiency of the indictment, and the indictment clearly charging the defendant with a crime, and the sentence imposed being within the limits fixed by the Statute, the decision of the District Court should be affirmed.

Respectfully submitted,

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